

In the Supreme Court of the United States**OCTOBER TERM, 1971**

UNITED STATES OF AMERICA, PETITIONER**v.****MARIAN A. BYRUM, EXECUTRIX UNDER THE LAST
WILL AND TESTAMENT OF MILLIKEN C. BYRUM,
DECEASED**

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

ERWIN N. GRISWOLD,
*Solicitor General,***FRED B. UGAST,**
*Acting Assistant Attorney General,***MATTHEW J. ZINN,**
*Assistant to the Solicitor General,***LORING W. POST,
DONALD H. OLSON,**
*Attorneys,
Department of Justice,
Washington, D. C. 20530.*

INDEX

	Page
Opinions below -----	1
Jurisdiction -----	2
Question presented -----	2
Statute involved -----	3
Statement -----	3
Reasons for granting the writ -----	5
Conclusion -----	12
Appendix A -----	13
Appendix B -----	21
Appendix C -----	32

CITATIONS

Cases:

<i>Commissioner v. Estate of Church</i> , 335	
U.S. 632 -----	8, 10, 11, 12
<i>Commissioner v. Estate of Holmes</i> , 326	
U.S. 480 -----	7, 10
<i>Helvering v. City Bank Co.</i> , 296 U.S. 85 -	12
<i>Helvering v. Hallock</i> , 309 U.S. 106 -----	8, 10
<i>King, Estate of v. Commissioner</i> , 37 T.C.	
973 -----	8
<i>Lober v. United States</i> , 346 U.S. 335 -----	7, 10
<i>May v. Heiner</i> , 281 U.S. 238 -----	12
<i>Reinecke v. Northern Trust Co.</i> , 278 U.S.	
339 -----	12
<i>United States v. Estate of Grace</i> , 395 U.S.	
316 -----	6, 8, 10, 11
<i>United States v. O'Malley</i> , 383 U.S. 627 -	7, 8, 9
<i>Yeazel v. Coyle</i> , 68-1 U.S.T.C. par.	
12,524 -----	8-9

Statutes:

Page

Internal Revenue Code of 1939 (26
U.S.C.), Sec. 811

7

Internal Revenue Code of 1954 (26
U.S.C.):

Sec. 2035	9
Sec. 2036	7, 9, 10, 12
Sec. 2036(a)	2, 3, 4, 5, 11
Sec. 2036(a)(1)	5, 10, 11
Sec. 2036(a)(2)	5, 7, 8, 9
Sec. 2037	7, 10
Sec. 2038	7, 10

Miscellaneous:

1 O'Neal, <i>Close Corporations</i> (1971 ed.)	11
Rev. Rul. 67-54, 1967-1 Cum. Bull. 269	6

In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

UNITED STATES OF AMERICA, PETITIONER

v.

**MARIAN A. BYRUM, EXECUTRIX UNDER THE LAST
WILL AND TESTAMENT OF MILLIKEN C. BYRUM,
DECEASED**

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion and order of the district court (Appendix A, *infra*, pp. 13-20) are reported at 311 F. Supp. 892. The majority opinion of the court of appeals and the dissenting opinion of Chief Judge Phil-

lips (Appendix B, *infra*, pp. 21-31) are reported at 440 F. 2d 949.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1971 (Appendix C, *infra*, pp. 33-34). By order dated June 28, 1971, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including September 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The decedent transferred to an irrevocable trust stock in three corporations which he controlled, and he retained, for his lifetime, the right to vote the transferred stock and voting control of the corporations, and also reserved the power to prevent the trustee from selling or otherwise disposing of the stock.

The question presented is whether the value of the stock transferred is includable in the decedent's gross estate because, within the meaning of Section 2036(a) of the Internal Revenue Code of 1954, he retained for his lifetime the right to designate the persons who would enjoy the income from the stock or the right to continued enjoyment of the stock.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2036. TRANSFERS WITH RETAINED LIFE ESTATE.

(a) *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

STATEMENT

Decedent owned 71 percent, 83 percent and 88 percent, respectively, of the stock of three closely-held corporations whose stock was at no time listed on any stock exchange. In 1958, he created an irrevocable trust for the benefit of his children and, from time to time thereafter, transferred shares in the three corporations to the trust. Under the trust terms, decedent retained for his lifetime the power to vote all unlisted stocks and the power to prevent the trustee

from selling or otherwise disposing of any trust assets. He thus had the same control over the corporations after the transfers as he had had previously, and was assured of that control for his lifetime.¹ (Appendix B, *infra*, pp. 22-25, 28-29.)

The trust instrument gave the corporate trustee power to distribute trust income and principal to the beneficiaries in its discretion. Until decedent's youngest child reached age 21, the trust was to be administered as a single unit, with no duty to equalize distributions among the children. Thereafter, separate trusts were to be established for each living child and for the surviving issue of any deceased child. Each child's separate trust was to terminate when that child reached age 35. (Appendix A, *infra*, p. 14; R. 28-30.)²

Section 2036(a) of the Internal Revenue Code of 1954 requires the inclusion in the gross estate of a decedent of the value of any property he has transferred by *inter vivos* gift, if he retained for his lifetime "(1) the * * * enjoyment of * * * the property" transferred; or "(2) the right, either alone or in con-

¹ The record ownership of shares of stock in the three corporations following the last of decedent's transfers was as follows (Appendix B, *infra*, p. 28):

Corporation	Trust	Settlor	Stock Outstanding
Byrum Lithographing	165	855	1,440
Graphic Realty	276	202	574
Bychrome	308	287	678

² The "R." reference is to the record appendix filed in the court of appeals, a copy of which we have lodged with the Clerk of this Court. The trust instrument is there reprinted in its entirety.

junction with any person, to designate the persons who shall * * * enjoy * * * the income therefrom." Following decedent's death on September 5, 1964, the Commissioner determined that the transferred stock was includable in his gross estate under Section 2036 (a) (2), because, by reason of his retained power to control corporate dividend policy, he had the right to regulate the flow of income to the trust, and thereby to postpone the beneficial enjoyment of the income from the stock until after his death. The Commissioner also determined that the shares were includable under Section 2036(a) (1), because, by reason of his retained power of voting control over each corporation, he had the right to continue to benefit economically from the transferred shares for his lifetime.

In the refund action which followed, on cross motions for summary judgment, the district court granted respondent's motion (Appendix A, *infra*, pp. 13-20).³ The government appealed, and the court of appeals affirmed, Chief Judge Phillips dissenting (Appendix B, *infra*, pp. 28-31). He would have held the transferred stock includable under both subsections of Section 2036(a).

REASONS FOR GRANTING THE WRIT

1. The decision below opens a substantial loophole in the estate tax law. It provides a solution to one of the most common and persistent estate planning

³ The jurisdiction of the district court rested on 28 U.S.C. 1346(a).

problems faced by majority owners of closely held corporate stock—how to maintain control of their corporations throughout their lifetimes, and yet pass on their businesses at death without paying estate taxes. Both of these goals can be readily accomplished by use of the device approved by the Sixth Circuit majority here.

If permitted to stand even temporarily, the decision below will invite widespread utilization of the estate plan sanctioned, both within the Sixth Circuit, and elsewhere, where this precedent offers the promise of tax benefits previously thought to be unavailable. See Rev. Rul. 67-54, 1967-1 Cum. Bull. 269. Majority corporate owners who insist on retaining lifetime control of their corporations will not hesitate to rely on the court of appeals' holding, for they have little to lose, and much to gain, by doing so. The impact of the decision, both in terms of the number of taxpayers affected and the revenues involved, is substantial, and warrants review by this Court.

Moreover, prompt review of the question presented also is desirable from the standpoint of sound administration of the estate tax laws. A failure now to resolve this question definitively will result in a multiplicity of administrative proceedings, and then in extensive litigation, because, short of a decision by this Court, the Internal Revenue Service cannot accept a rule which strikes so directly at the integrity of the estate tax provisions. As in the case of the somewhat related problem involving reciprocal trusts (see *United States v. Estate of Grace*, 395 U.S. 316,

where this Court granted the government's petition for certiorari), a surge of litigation can be avoided only through review by this Court.

2. The principles underlying Section 2036 and related provisions of the estate tax law (Sections 2037 and 2038), all of which are derived from Section 811 of the 1939 Code, have been forged by this Court in a series of decisions spanning the last three decades. The holding below, in both its aspects, conflicts in principle with these decisions, and is erroneous.

a. It is settled that a grantor's retained power either to distribute or to accumulate trust income constitutes a power to "designate" within the meaning of Section 2036(a)(2) (see *United States v. O'Malley*, 383 U.S. 627, 631; see also *Commissioner v. Estate of Holmes*, 326 U.S. 480, 487; *Lober v. United States*, 346 U.S. 335), since a grantor who retains the power to accumulate may, by exercising it, deny the current beneficiaries the privilege of immediate enjoyment, and condition their eventual enjoyment upon surviving the grantor. See *United States v. O'Malley*, *supra* at 631. As the Court said in the *O'Malley* case, a contrary conclusion would do violence to "the legislative policy of subjecting to tax all property which has been the subject of an incomplete *inter vivos* transfer."

Decedent's transfers here were likewise incomplete. Of the bundle of rights which inhered in his ownership of the shares, he retained important elements which gave him continuing voting control of the corporations. Thus he had effective power to determine all aspects of corporate policy, including corporate

dividend policy. Unless he approved the payment of dividends, no income could pass to the current beneficiaries of the trust during his lifetime. The conclusion of the majority below that this did not constitute the power to "designate" within the meaning of *O'Malley* ignores the long established principle that substance and reality, rather than form, are to govern in the application of Sections 2036-2038 and their predecessor provisions. See *Helvering v. Hallock*, 309 U.S. 106, 114, 116-118; *Commissioner v. Estate of Church*, 335 U.S. 632, 643-646; see also *United States v. Estate of Grace*, 395 U.S. 316, 321.

Contrary to the majority view in the court of appeals (Appendix B, *infra*, p. 27), it is not material that decedent's control over dividend policy may have been exercised through the boards of directors of the corporations, rather than by him individually. Section 2036(a) (2) is not confined to situations in which the grantor alone has the power to accumulate income. It applies whether his power is exercisable "alone or in conjunction with any person." (Emphasis added.) Indeed, in the *O'Malley* case itself, the grantor was one of three trustees (383 U.S. at 629).⁴

⁴ *Estate of King v. Commissioner*, 37 T.C. 973, upon which the majority below relied (Appendix B, *infra*, p. 26), is not in point. The Tax Court there specifically found as a fact (37 T.C. at 974) that the securities in question "were at no time significant from the point of view of control of the particular companies involved." *Yeazel v. Coyle*, 68-1 U.S. T.C. par. 12,524 (N.D. Ill.), also cited below (Appendix B, *infra*, p. 26), is contrary to our position. In that case, however, unlike this one, the district court acknowledged that the grantor, as controlling stockholder, could have prevented the payment of a dividend and thereby regulated the

Nor is it significant, as the majority thought (Appendix B, *infra*, p. 27), that the directors of a corporation have "a fiduciary obligation to exercise sound business judgment in declaring dividends, and could not act in bad faith to the injury of the beneficial owners of the stock." This obligation is no more governed by an "ascertainable standard" (*ibid.*) than the similar obligation of a trustee who is expressly empowered in his sole discretion to distribute or accumulate trust income. The discretion invested in corporate directors either to declare dividends or to reinvest earnings in the business, like the trustee's discretionary power to accumulate, is so broad as to preclude judicial oversight, save in cases of clear abuse. The fiduciary obligation does not, therefore, provide a limitation on the power to designate sufficiently definite to remove the case from the reach of Section 2036(a)(2). Wherever the dividing line may ultimately be drawn between ascertainable and non-ascertainable standards for purposes of that provision, the former category surely cannot include a limitation, such as that involved here, which leaves

flow of income to the trust. Having done so, it inexplicably concluded, despite this Court's opinion in *O'Malley, supra*, that—

[a]lthough * * * [the settlor] could have prevented the corporation from paying a dividend, that action would not have deprived the beneficiaries of the possession or enjoyment of either the property or income because the retained earnings of the company would increase, thus making the beneficiaries' stock more valuable * * *

Moreover, the district court went on to hold that the stock was includable in the decedent's gross estate under Section 2035, thus making its Section 2036 discussion mere dictum and precluding the government from taking an appeal.

the grantor largely free to choose between two entirely appropriate alternatives, one of which may have the effect of postponing the beneficial enjoyment of the income until after his death.

b. By retaining voting control of the corporations and the right to veto any sale of corporate stock, decedent also retained the "enjoyment of * * * the property" within the meaning of Section 2036(a)(1). This Court has repeatedly held that the terms "'enjoyment' and 'enjoy,' as used in * * * [Sections 2036, 2037 and 2038 and their predecessors], are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates." *Commissioner v. Estate of Holmes*, *supra* at 486. See *Helvering v. Hallock*, *supra* at 114, 117-119; *Commissioner v. Estate of Church*, *supra* at 645; *Lober v. United States*, *supra* at 637; *United States v. Estate of Grace*, *supra* at 320.

For all practical purposes with respect to the control of the corporations, decedent was in the same position after the transfers as he was previously. He retained the right to a position with the corporations as an officer, free from the possibility of discharge by the directors or other shareholders; he retained the right, within broad limitations, to receive compensation for his services in the form of salary, retirement and fringe benefits, which he could fix himself, within wide limits; he retained the right to determine whether and when the corporations would be liquidated or merged into other corporations; and he retained the right to determine how long these benefits would continue through his veto power over the disposition of trust assets. These are the critical

rights associated with the controlling stock interest in a close corporation (see 1 O'Neal, *Close Corporations*, Sec. 1.07 (1971 ed.)), and thus constitute a "substantial present economic benefit" as that term has been used by this Court.

To be sure, decedent did not retain all of his enjoyment of the transferred property. The trustee was given the right to receive such dividends as were declared by the board of directors controlled by decedent, to receive liquidation distributions if decedent, as controlling stockholder, voted to liquidate one or more of the corporations, and to receive the proceeds of the sale of some or all of the stock if decedent authorized the sale. But it is not necessary for the application of Section 2036(a)(1) that all rights to enjoyment be retained. This was settled in 1949 when the Court clearly declared in *Commissioner v. Estate of Church*, *supra* at 645, that a settlor could avoid tax under the "enjoyment" provisions only by a transfer in which he "absolutely, unequivocally, irrevocably, and without possible reservation, parts with * * * all of his enjoyment of the transferred property. After such a transfer has been made, the settlor must be left with * * * no right * * * to enjoy the property then or thereafter." (Emphasis added.)

The rule stated in *Church* remains good law. The Court reaffirmed it only two years ago in *United States v. Estate of Grace*, *supra*, in explaining (395 U.S. at 320) that "[t]he general purpose of the statute [the predecessor of Section 2036(a)] was to include in a decedent's gross estate transfers that are essentially testamentary—i.e., transfers which leave

the transferor a *significant* interest in or control over the property transferred during his lifetime." (Emphasis added.) The decision below cannot be squared with this purpose.⁵

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED B. UGAST,
Acting Assistant Attorney General.

MATTHEW J. ZINN,
Assistant to the Solicitor General.

LORING W. POST,
DONALD H. OLSON,
Attorneys.

AUGUST 1971.

⁵ The majority below cited *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (Appendix B, *infra*, pp. 26, 27), for the proposition that the grantor's retention of broad managerial powers over a trust, including the right to veto sales of trust assets, does not require inclusion of the trust property in his gross estate. Insofar as the issues in that case may have turned on managerial powers, it is enough to point out that it arose prior to the enactment in 1924 of the predecessor of the present Section 2038 (see *Helvering v. City Bank Co.*, 296 U.S. 85, 89-90), and under the statute in force prior to the decision in *May v. Heiner*, 281 U.S. 238, which was thereafter completely recast by Congress into the predecessor of the present Section 2036 (see *Commissioner v. Estate of Church*, *supra* at 639-640). At all events, the general proposition concerning managerial powers has no bearing where, as here, the veto power, coupled with retained voting control of the corporations in question, enabled the grantor to regulate the flow of income to the beneficiaries, and to continue to enjoy much of the economic power represented by the stock transferred in trust.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 68-42

MARIAN A. BYRUM, Executrix, etc., PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed April 16, 1970]

OPINION AND ORDER

This matter is before the Court on the motions of both the plaintiff and the defendant for summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

Rule 56(a) Fed. R. Civ. P. authorizes that "a party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." Rule 56(b) Fed. R. Civ. P. makes essentially similar provisions with respect to a defending party. Where the pleadings and affidavits on file show that there is no genuine issue as to any material fact relating to the issues presented by the motion, a summary judgment on the motion, if appropriate, may be rendered forthwith.

On July 16, 1968, the plaintiff, Marian A. Byrum, Executrix of the estate of Milliken C. Byrum, deceased, moved this Court for summary judgment in her favor on the pleadings. A memorandum of law

accompanied this motion. Then on September 13, 1968, defendant, United States of America, filed its motion for summary judgment and the memorandum in support thereof was received on October 2, 1968. Finally, on October 21, 1968 the plaintiff filed a reply memorandum.

The facts which have given rise to this lawsuit are undisputed and the vehicle of summary judgment as provided in the federal rules seems a most appropriate method of resolving the issues presented. Under a Trust Agreement dated December 9, 1958, a certain block of common capital voting stock was transferred by the decedent during his lifetime to the Huntington National Bank as sole trustee. The agreement provided for a discretionary trust for the benefit of the settlor's children with the corpus being administered as a single trust until the youngest child reaches the age of 21 years. Prior to the youngest child reaching the age of 21 years, the distribution of income and principal was in the absolute and sole discretion of the trustee "with due regard to the individual needs for education, care, maintenance and support" of the children or any child.

The trust, by its terms, was irrevocable with the rights retained by the settlor being the power to vote the unlisted corporate stock in the trust, the power to remove the designated trustee and appoint a successor corporate trustee, and the power to veto the sale or investment of the trust corpus.

The Court is directly concerned with the interpretation to be given to a section of the Internal Revenue Code. Section 2036 of Title 26, United States Code, provides in relevant part:

(a) General rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the dece-

dent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact and before his death—

- (1) the possession or enjoyment of, or the right to the income from, the property, or
- (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

The specific provision of the Trust Agreement which will be the focus of the present judicial inquiry is Section 5.06. It provides:

[The Trustee shall have the power] To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that, during Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

The precise legal question presented to the Court for determination is whether Section 2036(a)(1) and/or (2) of the Internal Revenue Code operates to make includable in the gross estate of the decedent the unlisted corporate stock mentioned in Section 5.06 of the Trust Agreement.

The Court is not without legal precedent on this matter although there does not appear to be any prior decisions dealing with these identical set of facts. With respect to Section 2036(a)(1) of the Internal Revenue Code, the includability of the corpus of the trust in the gross estate for estate tax purposes is predicated upon three requirements: (1) there must be an inter vivos transfer by the decedent by trust or otherwise; (2) the decedent must have retained "the possession or enjoyment of or the right to income from the property"; and, (3) such retention of reservation must have been for the decedent's life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death. *Richards v. C.I.R.*, 375 F.2d 997 (10th Cir. 1967) and 26 U.S.C.A. § 2036 (a)(1).

There is no dispute in this case with respect to (1) and (3) above, but the applicability of (2), that is, whether the decedent retained "the possession or enjoyment of or the right to income from the property," is a determination that must be made by the Court.

For the purposes of the statute which makes includable in a decedent's gross estate for federal tax purposes the value of all property of which the decedent made a transfer under which he retained for his life the possession or enjoyment thereof, the term enjoyment is not a word of art but is synonymous with substantial present economic benefit. *McNichol's Estate v. C.I.R.*, 265 F.2d 667 (3d Cir. 1959), cert. denied, 361 U.S. 829.

The Government's own regulations seem to follow a similar interpretation of this term:

The "use, possession, right to the income, or other enjoyment of the transferred property" is

considered as having been retained by or reserved to the decedent to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation, or otherwise for his *pecuniary benefit*. Reg. § 20.2036-1. [Emphasis added.]

Case law defining the exact scope of the term "substantial present economic benefit" is somewhat sparse, especially with reference to the fact situation that is presented in this case. The case of *Yeazel v. Coyle*, 2 CCH Fed. Estate & Gift Tax Rep. (68-1 U.S. Tax Cas.) ¶ 12,524 (N.D. Ill. Nov. 18, 1968), provides the Court with a relevant discussion of the matter. In *Yeazel*, the testator had transferred to herself as trustee, shares of stock in a corporation in which she was, prior to the transfer, sole shareholder. The trust instrument gave her broad authority to sell and invest the corpus without the limitation of any statute or rule of court concerning investment by trustees and she was empowered "to vote all stock held as part of the trust property." The Government contended that the trust transfer left the decedent with significant powers over this stock, including the ability to control the corporation and thus the distribution of dividends, thereby making the value of the stock includable in the gross estate under Section 2036(a)(1).

It is apparent that the decedent retained no direct pecuniary benefit from the stock she placed in trust. All of the income was to be paid to the named beneficiaries. The corpus of the trust was irrevocably earmarked for the four beneficiaries. . . . It is true that by reason of retaining the voting rights, Mrs. Crowley remained in the position of controlling the dividend policy

of the corporation and the distribution of income to the beneficiaries. Although Mrs. Crowley could have prevented the corporation from paying a dividend, that action would not have deprived the beneficiaries of the possession or enjoyment of either the property or income because the retained earnings of the company would increase, thus making the beneficiaries' stock more valuable. . . . Even without the direct payment of dividends, the beneficiaries were in a position to receive the economic benefit of the stock since they could use it as security for a loan which would provide them with cash until the end of the ten year period, at which time they would receive the stock itself. If the Government's argument were carried to its logical conclusion, the donor of the stock in a closely held corporation would be required to divorce himself of all remaining interest in the corporation in order to make his gift effective for tax purposes. The sweep of Section 2036(a) is not that broad. *Yeazel, supra*, at 8684-5.

The Court substantially agrees with the rationale of the *Yeazel* opinion. The Government seeks to distinguish *Yeazel* on the ground that the decedent there was also the trustee, thus her retained power was limited by the fiduciary obligation, enforceable in a court of equity, imposed by her position as trustee. The fact that Byrum in this case was not a trustee, however, indicates to the Court that Byrum was that much further removed from control of the economic benefits of the stock. Further, while it is true that Byrum had the power to remove the trustee and appoint a successor corporate trustee at any time (thus in reality, the Government suggests Byrum had trustee type control over the trust corpus), whatever

powers exercised by any successor corporate trustee were subject to scrutiny by a court of equity, thus preventing abuse of the trustee's power in favor of Byrum and thus squaring the *Yeazel* rationale with the facts in the instant case.

Section 2036(a) (2) of the Internal Revenue Code provides that the value of the gross estate of a decedent shall include the value of all property in which the decedent has retained:

the right, either alone or in conjunction with any person, to designate the person who shall possess or enjoy the property or the income therefrom. 26 U.S.C.A. § 2036(a) (2).

The Government contends that the settlor's retention of his right to vote the unlisted stock transferred in trust together with his right to vote the stock he still owns gives him the right to designate the recipient of the income under the Trust Agreement. Reliance is placed by the Government on Revenue Ruling 67-54, 1967-1 Cumulative Bulletin 269. This ruling states:

The value of nonvoting corporate stock transferred in trust is includible in the grantor's gross estate where the grantor retained for the remainder of his life a controlling interest in the corporate voting stock and where the trustee was restricted in his power to dispose of the nonvoting stock, and the trustee held the nonvoting stock at the grantor's death. Since the grantor retained the power to regulate the income from the transferred property, he retained for his life or for a period which did not in fact end before his death the right to designate the persons who shall possess or enjoy the property or the income therefrom. The value of the nonvoting shares included in the gross estate should

reflect the additional value inherent in the closely held voting shares by reason of control of the company policies.

The *Yeazel* court distinguished this Revenue Ruling by stating:

My attention is also called to *Rev. Rul.* 67-54, 1967-8 Int. Rev. Bull. 10, which I am urged to regard as stating that a grantor with control over both the dividend policy of a company and the assets of the trust is able to designate who benefits from the property or income. As applied to the facts in this case, however, I cannot agree with this view of the statute since it is clear that only the four named beneficiaries can benefit from the stock. *Yeazel, supra*, at 8685.

The Court determines that Revenue Ruling 67-54 cannot operate to make includable this trust property in the decedent's estate. The decedent's power to control the trust property was not without limitation and the Court considers that sufficient control was relinquished, and sufficient checks were retained on what control was retained, to avoid the application of Section 2036 to the facts in the instant case. See, generally, *Jennings v. Smith*, 161 F.2d 74 (2nd Cir. 1947) and 3 J. Merten's Estate and Gift Tax § 24.30.

WHEREUPON, the Court determines that the motion of the plaintiff for summary judgment is meritorious and therefore it is GRANTED. The motion of the defendant for summary judgment is without merit and therefore it is DENIED.

Defendant is hereby ORDERED to refund the sum of \$13,202.45, together with interest at the rate of six percent (6%) per annum from June 28, 1967.

/s/ Joseph P. Kinneary
United States District Judge

APPENDIX B

No. 20526

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARIAN A. BYRUM, Executrix under the Last Will
and Testament of MILLIKEN C. BYRUM, Deceased,
PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed April 8, 1971

Before: PHILLIPS, Chief Judge, BROOKS, Circuit
Judge, and O'SULLIVAN, Senior Circuit
Judge.

BROOKS, Circuit Judge. This is an appeal by the United States from an adverse ruling of the District Court, 311 F. Supp. 892, on the issue of whether certain assets transferred into an irrevocable trust could be included in decedent-grantor's estate by operation of 26 U.S.C. § 2036.¹ The action arose by a

¹ Section 2036 [as amended by Section 18 (a) (2) of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960].

"Transfers with retained life estate

"(a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a

claim for refund of taxes paid and was decided on motions for summary judgment with a stipulated set of facts. We affirm the judgment of the District Court.

That portion of the trust agreement² that the Gov-

transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

“(1) the possession or enjoyment of, or the right to the income from, the property, or

“(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.”

² The Trust Agreement in pertinent parts provided:

“Article IV. Irrevocable Trust.

“This Trust shall be irrevocable and Grantor reserves no rights, powers, privileges or benefits either as to the Trust estate or the control or management of the trust property, except as set forth herein.

“Article V. Powers Of The Trustee.

“The Trustee shall have and possess and may exercise at all times not only the rights, powers and authorities incident to the office or required in the discharge of this trust, or impliedly conferred upon and vested in it, but there is hereby expressly conferred upon and vested in the Trustee all the rights, powers and authorities embodied in the following paragraphs in this Article, which are shown by way of illustration but not by way of limitation:

* * *

“Sell. 5.02 To sell at public or private sale, to grant options to sell, to exchange, re-exchange or otherwise dispose of all or part of the property, real or personal at any time belonging to the Trust Estate, upon such terms and conditions and for such consideration as said

Trustee shall determine, and to execute and deliver all instruments of sale or conveyance necessary or desirable therefor.

* * *

"Investments. 5.05 To invest any money in the Trust estate in stocks, bonds, investment trusts, common trust funds and any other securities or property, real or personal, secured or unsecured, whether the obligations of individuals, corporations, trusts, associations, governments, expressly including shares and/or obligations of its own corporation, or otherwise, either within or outside of the State of Ohio, as the Trustee shall deem advisable, without any limitation whatsoever as to character of investment under any statute or rule of law now or hereafter enacted or existing regarding trust funds or investments by fiduciaries or otherwise.

"Voting. 5.06 To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that during Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

* * *

"Leases. 5.09 To make leases for any length of time, whether longer or shorter than the duration of this Trust, to commence at the present time or in the future; to extend any lease; to grant options to lease or to renew any lease; it being expressly understood that the Trustee may grant or enter into ninety-nine year leases renewable forever.

* * *

"Income Allocation. 5.13 To determine in its discretion how all receipts and disbursements, capital gains and losses, shall be charged, credited or apportioned between income and principal.

* * *

"Limitation. 5.15 Notwithstanding the powers of the Trustee granted in paragraphs 5.02, 5.05, 5.09 and 5.11 above, the Trustee shall not exercise any of the

powers granted in said paragraphs unless (a) during Grantor's lifetime said Grantor shall approve of the action taken by the Trustee pursuant to said powers, (b) after the death of the Grantor and as long as his wife, Marian A. Byrum, shall live, said wife shall approve of the action taken by the Trustee pursuant to said powers.

"Article VI. Division At Age 21.

* * * *

"Principal Disbursements. 6.02 If prior to attaining the age of thirty-five (35), any one of the children of Grantor shall have an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of such child, the Trustee is hereby authorized and empowered to pay to such child or use for his or her benefit such amounts of income and principal of the Trust as the Trustee in its sole judgment and discretion shall determine.

* * * *

"Article VIII. Removal of Trustee.

"If the Trustee, The Huntington National Bank of Columbus, Columbus, Ohio, shall at any time change its name or combine with one or more corporations under one or more different names, or if its assets and business at any time shall be purchased and absorbed by another trust company or corporation authorized by law to accept these trusts, the new or successor corporation shall be considered as the said The Huntington National Bank of Columbus, Ohio, and shall continue said Trusts and succeed to all the rights, privileges, duties and obligations herein conferred upon said The Huntington National Bank of Columbus, Ohio, Trustee.

"Grantor, prior to his death, and after the death of the Grantor, the Grantor's wife, Marian A. Byrum, during her lifetime, may remove or cause the removal of The Huntington National Bank of Columbus, Ohio, or any successor Trustee, as Trustee under the Trusts and may

ernment contends made the assets transferred into trust includable in the grantor's estate under 26 U.S.C. § 2036 relates to the grantor's retained powers to: 1) vote the shares of unlisted stock in the trust corpus; 2) veto the transfer by the trustee of any of these shares of stock; and 3) to remove and appoint a successor corporate trustee at will. It should be noted that the shares of unlisted stock transferred into trust were those of a closed corporation, and the grantor's retaining of the right to vote the stock in trust combined with the stock he personally retained kept him in voting control of the corporation.

The Government's principal argument is that the powers retained by grantor made the value of the shares of stock transferred into trust includable in his estate because the grantor retained for his life "the possession or enjoyment of . . . the property" 26 U.S.C. § 2036(a)(1). The District Court properly concluded that the retaining of the power to veto the sale of these shares of stock by the trustee

thereupon designate another corporate Trustee to serve as successor Trustee hereunder.

"Article IX. Miscellaneous Provisions.

* * * *

"Discretion 9.02 If in the opinion of the Trustee it shall appear that the total income of any beneficiary of any Trust fund created hereunder is insufficient for his or her proper or suitable support, care and comfort, and education and that of said beneficiary's children, the Trustee is authorized to pay to or for such beneficiary or child such additional amounts from the principal of the Trust Estate as it shall deem advisable in order to provide suitably and properly for the support, care, comfort, and education of said beneficiary and of said beneficiary's children, and the action of the Trustee in making such payment shall be binding on all persons.

did not, under present interpretation of the statute, make the value of the shares transferred includable in the grantor's estate, see *Reinecke v. Northern Trust Company*, 278 U.S. 339 (1929); *Michigan Trust Company v. Kavanagh*, 284 F.2d 502 (6th Cir. 1960); *Hays' Estate v. Commissioner of Internal Revenue*, 181 F.2d 169 (5th Cir. 1950); *Jennings v. Smith*, 161 F.2d 74 (2nd Cir. 1947); *Estate of Budd*, 49 T.C. 468 (1968); *Estate of Pardee*, 49 T.C. 140 (1967); Cf. *State Street Trust Company v. United States*, 263 F.2d 635 (1st Cir. 1959). Nor, for that matter, did the grantor's retaining of the power to replace the trustee by another corporate trustee make the value of the shares includable. See *Estate of Budd*, *supra* and cf. Rev. Reg. 20.2036-1(b)(3) with n. 2 Trust Agreement, Article VIII.

The only power retained by the grantor which may possibly have made the transferred assets includable in his estate was the power to vote the unlisted shares of stock. The District Court concluded that this did not make the assets includable and we agree. Several cases have considered this aspect of retained control and have concluded that it is not sufficient to make the value of shares transferred in trust includable in the grantor's estate. See *Estate of Willard V. King*, 37 T.C. 973 (1962); *Yeasel v. Coyle*, 2 CCH Fed. Estate and Gift Tax Rep. (68-1 U.S. Tax Cas.) ¶ 12,524. The Government's attempt to distinguish these cases is without substance. In addition, the Government's reliance on *United States v. O'Malley*, 383 U.S. 627 (1966) and *Joy v. United States*, 404 F.2d 419 (6th Cir. 1968) is inappropriate under the facts of the present case. In *O'Malley* the crucial factor making the value of the transferred assets includable in the grantor's estate was that the grantor retained the power to regulate or allocate

the distribution of income. Similarly, in *Joy v. United States*, *supra*, it was the grantor's retained power to accumulate and distribute income which proved fatal. This was not the situation under the present trust agreement. See n. 2 Trust Agreement, Par. 5.13, 5.15, 6.02, 9.02. The Government contends that since the grantor remained in voting control of the corporation he could, by electing the Board of Directors, determine dividend policies and thus the grantor could indirectly regulate or control who enjoyed the income from the property. However, the grantor by retaining the voting right of the stock only controlled who could serve as directors of the corporation. These individual directors would then be under a fiduciary obligation to exercise sound business judgment in declaring dividends and could not act in bad faith to the injury of the beneficial owners of the stock. This obligation is governed by an ascertainable standard and is analogous to the situation which exists in cases where the grantor retains broad managerial control of a trust, see *Reinecke v. Northern Trust Company*, *supra*; *Jennings v. Smith*, *supra*; *Estate of Budd*, *supra*, and does not result in making these assets includable in the grantor's estate.

While Revenue Ruling 67-54, 1967-1 Cum. Bull. 269, strictly construed is distinguishable from the facts in this case, it does tend to support the position advanced by the Government on this appeal. Rulings, however, do not have the force of law and are at most merely persuasive. *Lincoln Savings and Loan Association v. Commissioner of Internal Revenue*, 422 F.2d 90, 92 (9th Cir. 1970), U.S. App. Pndg.; 1 Mertens, Law of Federal Income Taxation, § 3-20. Insofar as such Ruling might be applied to the facts of this case, it is in conflict with the law as interpreted by the courts and should be disregarded.

United States Truck Sales Company v. United States, 229 F.2d 693, 696 (6th Cir. 1956); *First Kentucky Company v. Gray*, 190 F.Supp. 824, 825 (W.D.Ky., 1960), affirmed 309 F.2d 845 (6th Cir. 1962).

The judgment is affirmed.

PHILLIPS, Chief Judge. (Dissenting.) I respectfully dissent.

Mr. Byrum, the decedent, transferred to the trust some of his shares of stock in three closely-held corporations of which he was the controlling stockholder. He reserved the right to vote the shares which he transferred to the trust. He also continued to have the right to vote the shares owned by him individually which were not transferred to the trust. His right to vote the transferred shares, combined with his right to vote the shares which he held himself and did not transfer in trust, kept him in control of all three corporations throughout his lifetime.

The record ownership of shares of stock in the three corporations as of the time of Mr. Byrum's death on September 5, 1964, was as follows:

Corporation	Trust	Settlor	Stock Outstanding
Byrum Lithographing	165	855	1440
Graphic Realty	276	202	574
Bychrome	308	287	678

As I interpret the trust instrument, Mr. Byrum's control of the three corporations was the same after the creation of the trust as it was before. After the transfers, as before, the settlor remained in a position to dictate the dividend policies of the corporation. He had the power to control the distribution

of income to the trust. He could determine when and whether the corporation would distribute earnings as dividends and thus when and whether the trust would receive income from the stock which would be available for distribution to the beneficiaries of the trust.

In addition to reserving the right to vote the stock, he retained the power to veto any sale of the stock by the trustee and the right to remove the trustee and appoint a new trustee.

It is not determinative, in my opinion, that any one of these retained rights, standing alone in a different factual situation, might not have subjected the stock to the federal estate tax as a part of the taxable estate of the decedent. I would hold that the retained powers in the aggregate, under the facts and circumstances of this case, operated to reserve to the settlor the enjoyment of the shares and the right to designate the persons who would enjoy the income from them, within the meaning of § 2036(a) (1) and (2) of the Internal Revenue Code of 1954.

I agree with the Government's interpretation of the trust instrument: that through his control of the corporations the settlor retained the power to determine whether the beneficiaries of the trust would receive income from the shares during his lifetime. When the trust instrument is thus construed, the settlor possessed the right to designate the persons who would enjoy the income from the shares within the meaning of § 2036(a) (2). *U. S. v. O'Malley*, 383 U.S. 627; *Joy v. U. S.*, 404 F.2d 419 (6th Cir.).

Since Mr. Byrum guaranteed to himself the right to control the corporations for his lifetime through rights retained under the trust instrument, the retained rights were of substantial present economic benefit to him. He was assured a position as a sal-

aried officer of the corporations for as long as he desired. He could increase his salary or fringe benefits. He could control all corporate decisions affecting him financially. I would hold that he retained for his life the enjoyment of the transferred stock within the intendment of § 2036(a)(1). See *Commissioner v. Estate of Church*, 335 U.S. 632, 644-46.

I further disagree with the majority opinion with respect to Revenue Ruling 67-54, 1967-1 Cum. Bull. 269. A copy of this ruling is made an appendix to this dissenting opinion. I consider this ruling to be a correct interpretation of the statute.

I would reverse.

APPENDIX

Rev. Rul. 67-54, 1967-1 Cum. Bull. 269:

The value of nonvoting corporate common stock transferred in trust is includible in the grantor's gross estate for Federal estate tax purposes, where the grantor retained for the remainder of his life a controlling interest in the corporate voting stock and where (1) the grantor was himself a trustee of the trust at his death, or (2) the trustee was restricted in any way in his power to dispose of the nonvoting stock, and the trustee held the nonvoting stock at the grantor's death. Since the grantor retained the power to regulate the income from the transferred property, he retained for his life or for a period which did not in fact end before his death the right to designate the persons who shall possess or enjoy the property or the income therefrom. The value of the nonvoting shares included in the gross estate should reflect the additional value inherent in

the closely held voting shares by reason of control of the company policies.

Advice has been requested whether the value of nonvoting corporate common stock transferred in trust is includible in the deceased grantor's gross estate for Federal estate tax purposes where he had the power to regulate, for his life or for a period which did not in fact end before his death, the potential income from the transferred property through his retention of the corporation's voting stock, in cases where (1) as trustee he could control the disposition of the transferred property during his lifetime, or (2) the trustee was restricted in any way in his power to dispose of the transferred property, and the trustee held the transferred property at the grantor's death.

The decedent transferred assets to a corporation which issued nonvoting preferred stock and debentures, which he retained, for the full current value of the assets transferred. The corporation also issued 10 shares of voting and 990 shares of non-voting common stock. The decedent transferred the 990 shares of nonvoting stock in trust for the benefit of his children. The trust owned the 990 shares at the date of the decedent's death. The trustee was required to get the permission of the grantor before disposing of the transferred stock. By retaining the 10 shares of voting stock, which he still owned at the time of his death, the decedent had complete control of the company and was in a position to determine its dividend policy in respect of the nonvoting shares. By the restriction upon the trustee, the decedent had control over the disposition of the non-voting stock.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20,526

MARIAN A. BYRUM, Executrix under the Last Will
and Testament of MILLIKEN C. BYRUM, Deceased,
PLAINTIFF-APPELLEE

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

[Filed April 8, 1971]

BEFORE: PHILLIPS, Chief Judge, BROOKS, Circuit
Judge, and O'SULLIVAN, Senior Circuit
Judge

Appeal from the United States District Court
for the Southern District of Ohio

JUDGMENT

THIS CAUSE came on to be heard on the record
from the United States District Court for the South-
ern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here or-
dered and adjudged by this Court that the judgment
of the said District Court in this cause be and the
same is hereby affirmed.

It is further ordered that Plaintiff-Appellee re-
cover from Defendant-Appellant the costs on appeal,

as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the
Court

/s/ Carl W. Reuss
Clerk

Issued as Mandate:

COSTS: NONE

